No. [redacted] 81

Supreme Court of the United States

October Term, [redacted] 1958

WHITLOCK CORPORATION,

Petitioner,

AGAINST

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF CLAIMS

JULIUS SCHEIN,
Attorney for Petitioner,
1619 Broadway,
New York City, N. Y.

On the Brief:

ALFRED S. JULIEN, ESQ.,
MARTIN BERGMAN, ESQ.,
ARNOLD L. KLEINICK, ESQ.,
Members of the New York Bar.

LODER APPEAL PRESS, INC., 65 Duane Street, N. Y. C. WOrth 2-0689.

INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statement	2
Reasons for Granting the Writ; for Summary Reversal of the Judgment of the Court of Claims and Judgment in Favor of the Plaintiff in the Sum of $23,244.56 (Finding 15, R. 52)	5
Point I.—The Contract Was Frustrated as a Matter of Law	6
Point II.—The Receipt of Evidence After Trial Constituted Error	9
Conclusion	10
Appendix	11

CASES CITED

Canadian Ind. Alcohol Co. v. Dunbar M. Co., 258 N. Y. 194 (1932)	8
Lomax Transportation Co. v. United States, 183 F. 2d 331, C. A. 9 (1950)	9

PAGE

Mohawk Condensed Milk Company v. United States, 70 C. Cls. 671 48 F. 2d 682 (1930) 9

Operators' Oil Co. v. Barbre, 65 F. 2d 857 C. C. A. 10 (1933) 7

Texas Co. v. Hogarth Shipping Corp., 256 U. S. 619, 41 S. Ct. 612 (1921) 8

Western Hardware & Mfg. Co. v. Bancroft Charnley Steel Co., 116 F. 176 C. C. A. 7 (1902) 8

STATUTES CITED

Title 28, U. S. C. A. 1255 1

Title 31, U. S. C. 46 and 52c 10

MISCELLANEOUS AUTHORITY CITED

Williston on Contracts, Rev. ed., Vol. 6, Sec. 1939 9

Supreme Court of the United States

OCTOBER TERM, 1957

WHITLOCK CORPORATION,

Petitioner,

AGAINST

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF CLAIMS

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Whitlock Corporation, a New York corporation, prays that a Writ of Certiorari be issued to review the judgment of the Court of Claims in the above case.

Opinion Below

The opinion of the Court of Claims was reported in *Whitlock Corporation* v. *The United States*, 159 F. Supp. 602, 1958, and a copy of the opinion below is annexed hereto, in the appendix, *infra*, pages 11 to 30.

Jurisdiction

The judgment of the Court below was entered on March 5, 1958. The jurisdiction of this Court is invoked under Title 28, United States Code Annotated, Section 1255, Subd. I, Enacted June 25, 1948, C. 646, No. 1, 62 Stat. 928.

Questions Presented

I

Was the contract under which Whitlock Corporation was to sell belt buckles to the United States of America frustrated by the insolvency and closure of the plant of The Hatheway Manufacturing Company*, at which plant, according to the specifications of the contract, the belt buckles were required to be manufactured?

II

Could the Government's failure to prove its case and its damages at trial, as found by the hearing commissioner and the Court of Claims, be rectified long after the conclusion of the trial by the submission, over objection, without testimony or opportunity for cross-examination, of cancelled vouchers and proof of payment under Government seal and the signature of some unknown person in the United States General Accounting Office?

Statement

The Whitlock Corporation was a jobber who successfully bid on a contract to supply belt buckles to the Government (R. 46 and Appendix-Finding of Fact 5**). The Government knew that Whitlock was not itself a manufacturer (R. 48) and the contract specified that the belt buckles were to be manufactured at the plant of The Hatheway Manufacturing Company, a reliable Connecti-

*Hereafter referred to as Hatheway.

**All page references preceded by letter R., refer to the record compiled by the U. S. Court of Claims on file in this Court.

cut manufacturer, with over fifty years experience and an adequate credit rating (R. 45).

Before awarding the contract, the Government made a pre-award survey of the Hatheway plant (see Exhibit 8, Hearing Before Board of Contract Appeals, p. 52, lines 20-22, p. 58, lines 15-17, p. 60, lines 1-10, where the pre-award survey was received as appellant's Exhibit No. 8).

The contract provided that the entire manufacture of items to be sold was to take place at the plant of the Hatheway Manufacturing Company, Bridgeport, Conn., and that shipment was to be made from the aforesaid plant (Defendant's Exhibit 3). The Government's award of the contract specified " * * * name and location of plant: Hatheway Mfg. Co., Bridgeport, Conn." (Defendant's Exhibit 4).

The contract also provided:

> "27. NAMES AND LOCATION OF FACTORIES
>
> The names and locations of the factories where manufacture of the items bid upon will be performed are set forth herein. The performing of any of the work contracted for in any place other than that named herein is prohibited, unless the same is specifically approved in advance by the Contracting Officer. * * *." (U. S. Ct. Cl. Decision, R. 46.)

Even though jigs and dies were procured by Hatheway to engage in the manufacture of the buckles, it became insolvent, the mortgage on its plant was foreclosed, its assets were sold, its plant was closed, it ceased doing business, and became and was adjudged bankrupt before production of any buckles was completed and before de-

fault in the contract (Transcript of Testimony, pp. 77, 78, 80, Findings of Fact No. 9, R. 48).

Due to this impossibility of performance, Whitlock was declared in default by the contracting officer of the Army, who subsequently relet the item at a much higher price (R. 49 & 50).

The posture in which the case reached the Court of Claims was that the Government claimed moneys were due from Whitlock to recoup the Government's alleged excess cost on the reletting. It therefore withheld payments due Whitlock on other unrelated, performed Government contracts (R. 37).

Thus, Whitlock sued on the other contracts as to which there was no question (R. 52, Finding of Fact, 15), and at issue was the Government's counterclaim for alleged excess costs on reletting.

The case was tried before C. Murray Bernhardt, Commissioner, who was empowered to make findings of fact and recommend conclusions of law. The Commissioner determined that the Government had " * * * offered no testimony or other evidence in support of performance by or payment to Dorset* for the repurchased supplies.", and therefore concluded that plaintiff was entitled to recover from The United States the moneys due it in the sum of $23,601.30 (R. 36).

The Court of Claims agreed that the Government " * * * had failed to prove performance and payment of the repurchase contract.", and that the Certificate of Indebtedness from the General Accounting Office which the Government relied upon did not constitute proof that the repurchase contract had either been performed or paid for (R. 43).

---

*Dorset was the successful bidder on the relet contract.

In argument before the full bench of the Court of Claims, wherein the Government asked that the findings and recommendations of the Commissioner be disallowed, long after the evidence at trial had been closed, the Government was permitted to place in evidence, over objection, the exhibit which has no exhibit number and which constitutes a certificate under the seal of the United States General Accounting Office, to which are set forth photostats of bills and cancelled vouchers to Dorset Products Inc.

The theory upon which this leave was granted was referred to by the Court of Claims as follows:

> "The practice of waiting until this stage to seek the admission of evidence is not favored. It is permitted here not on the ground that this particular evidence is 'newly discovered', for such is clearly not the case, but because failure to consider it at this time would deny relief to defendant on what is otherwise a meritorious counterclaim." (Note 2, Dec. U. S. Ct. of Claims, R. 44)

The evidence which was thus received consists of a series of photostats certified by a party named P. D. Fallon, who was not identified as to office or authority. There was no testimony with respect to these vouchers, nor was there any opportunity for cross-examination.

Reasons for Granting the Writ: for Summary Reversal of the Judgment of the Court of Claims and Judgment in Favor of the Plaintiff in the Sum of $23,214.56 (Finding 13, R. 52)

We realize that this case involves a relatively small amount of money, but only a single appeal is permitted from the Court of Claims, and that is to this august tribu-

nal. We believe that the issues are so clear cut that this is an appropriate proceeding, calling for the Court's exercise of its summary power to grant reversal on the granting of the writ itself. This is a case where under the terms of a contract the vendor could not perform because the plant selected by the contract as the sole place for the production of the goods went out of existence.

POINT I

The Contract Was Frustrated, as a Matter of Law

The parties to this contract contemplated and expressed in writing their agreement that these belt buckles were to be manufactured at a specified plant, that of The Hatheway Manufacturing Co., at Bridgeport, Conn. They clearly said that all the buckles were to be manufactured and shipped from there. Whitlock was forbidden from making or shipping the buckles from any other point.

When that plant was foreclosed, became insolvent, closed its doors and went bankrupt, the contract was frustrated as a matter of law.

The Court of Claims suggests that "It can be inferred from the record as a whole that defendant would willingly have permitted plaintiff to perform through another subcontractor * * * (R. 41)"; but this is the equivalent of saying that the Government would have consented to a modification of the contract.

Parties may agree to modify their contract, but they are not compelled to do so. Whitlock has not been amerced in damages because it failed to comply with a modified contract. It is being held in damages because it failed to comply with a contract, the terms of which have been frustrated. It could very well have been that the parties could have agreed to a novation, but this is another contract and not the one that was before the Court below and enforced against the petitioner herein.

In *Operators' Oil Co. v. Barbre*, 65 F. 2d 857 C. C. A. 10 (1933), the defendant, a company not engaged in the oil business, had agreed to supply the plaintiff with crude oils from the oil fields owned by the Sunray Oil Company. Impossibility resulted because Sunray went into receivership.

In reversing the judgment below, which was for the plaintiff, the Circuit Court stated at pages 861 and 862:

> "In the absence of words denoting an intent to assume the risk of a supervening impossibility of performance occasioned either by the destruction of the subject matter or the interposition of a law forbidding or preventing performance a promisor is freed from liability for non-performance by such happenings. *Holmes v. Montauk Steamboat Co.* (C. C. A. (2) 93 F. 731; Ontario Deciduous Fruit-grower's Assn. v. Cutting Packing Co., 134 Cal. 21, ...; *International Paper Co. v. Rockefeller*, 161 App. Div. 180, ...; The Kronprinzessin Cecilie, 244, U. S. 12, 22, ... Williston on Contracts, Vol. 3, Sec. 1948; South Memphis Land Co. v. McLean Hardwood Lbr. Co. (C. C. A. 6) 179 F. 417. If further performance is impossible because of the receivership or bankruptcy of the promisor, his estate must respond in damages for the breach. ... But where performance is rendered impossible, by proceedings in a receivership of, a third party, for which the promisor is in no wise responsible, performance by the promisor is excused. Moller v. Herring (C. C. A. 5) 255 F. 670, ...; Kansas Union Life Ins. Co. v. Burman (C. C. A. 8), 141 F. 835, 848; Williston on Contracts, Vol. 3, Sec. 1939."

When the Hathaway plant was foreclosed and went into bankruptcy, it was the equivalent of the destruction of a mill or a refinery designated by the parties to a contract

as the source of supply from whence the vendor is to secure the merchandise which is the subject matter of the contract. This operates to discharge the vendor.

Canadian Ind. Alcohol Co. v. *Dunbar M. Co.*, 258 N. Y. 194, 198, 200 (1932), Cardozo, J.

It is obviously a gross injustice to tell Whitlock in its contract that it is prohibited from having the buckles made anywhere else than at Hatheway, all of which is agreed to after the Government has surveyed the Hatheway plant and approved of it, and then when the Hatheway plant is, in effect, destroyed to say that Whitlock must bear the brunt of the damage.

We contend that the applicable rule of law was set forth in *Texas Co.* v. *Hogarth Shipping Corp.*, 256 U. S. 619, 41 S. Ct. 612 (1921). The Court stated at page 629:

> "It long has been settled in the English Courts and in those of this country, Federal and State, that where parties enter into a contract on the assumption that some particular thing essential to its performance will continue to exist and be available for the purpose and neither agrees to be responsible for its continued existence and availability, the contract must be regarded as subject to the implied condition that, if before the time for performance and without the fault of either party the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it."

See also, *Western Hardware & Mtg. Co.* v. *Bancroft-Charnley Steel Co.*, 116 F. 176, C. C. A. 7 (1902).

The foreclosure and insolvency proceedings are of the type of judicial proceedings mentioned by Williston on

Contracts, Revised Edition, Vol. 6, at page 5433, Sec. 1939, where it is stated:

> "Where, however, the proceedings which interfere with the performance of the promise are based on no fault of the promisor, there seems no reason why the interference should not be an excuse, unless the circumstances surrounding the formation of the contract are such as to indicate that the possibility of such interference was recognized and the risk of it assumed by the obligor." (See Note 4, same page.)

POINT II

The Receipt of Evidence After Trial Constituted Error

The exhibit received by the Court of Claims in argument before it, long after the conclusion of the trial and the taking of evidence before the Commissioner, was a deprival of due process and runs counter to all modern concepts of adversary trial proceedings. Additionally, the exhibit is palpably insufficient on its face to comply with statutory requirements.

We will consider the above briefly in inverse order.

Both the Commissioner and the Court of Claims are in agreement that, absent the belated exhibit received by the Court in argument after the trial and after the case had been closed, there was no competent proof " * * * that the repurchase contract had either been performed or paid for. *Mohawk Condensed Milk Company* v. *United States*, 70 C. Cls. 671; *Lomax Transportation Co.* v. *United States*, 183 F. (2d) 331, 333" (R. 43).

There still is no competent proof. An examination of the belated exhibit shows that it is certified by one P. D. Failon, who was absolutely unidentified in the exhibit. This constitutes a fatal defect, since certification has to

be by the Controller General or Assistant Controller General or persons assigned by him to perform the duties (Title 31, U. S. C. 46, 52 e).

No one reading the exhibit can ascertain who Failon is, and it is not permissible to go outside the exhibit to establish his identity.

Moreover, there is something intrinsically wrong in permitting a deficiency in proof to be supplied sufficient to compel a decision in favor of the plaintiff Whitlock to be completely overturned by the last minute receipt of a sheath of papers, without testimony or without the opportunity of cross-examination, long after a trial and the receipt of evidence has been concluded.

The Court of Claims said:

> "The practice of waiting until this stage to seek the admission of evidence is not favored" (Footnote, R. 44).

We feel that it is to be condemned and constitutes reversible error.

CONCLUSION

The Petition Should Be Granted

Respectfully submitted,

JULIUS SCHEIN,
Attorney for Petitioner,
1619 Broadway,
New York City, N. Y.

On the Brief:

ALFRED S. JULIEN, ESQ.,
MARTIN BERGMAN, ESQ.,
ARNOLD L. KLEINICK, ESQ.,
Members of the New York Bar.

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 32-54

(Decided March 5, 1958)

WHITLOCK CORPORATION v. THE UNITED STATES

Mr. Noel W. Hauser for the plaintiff. *Mr. Alfred S. Julien* was on the brief.

Mr. Francis P. Borden, Jr. with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff sues to recover amounts withheld by defendant under contracts which were admittedly performed. The defendant counterclaims for a larger amount representing excess costs allegedly sustained when an earlier supply contract between the parties was terminated for default and the goods repurchased elsewhere at greater cost. The controversy, therefore, centers on the counterclaim.

On March 7, 1952, the plaintiff, a wholesale hardware jobber, contracted to supply the Philadelphia Quartermaster Depot with 1,175,400 brass buckles at unit and total prices of $0.064 and $75,225.60, respectively, pursuant to an invitation of the preceding December and plaintiff's low

bid thereon of January 9, 1952.[1] Since plaintiff was not a manufacturer it planned to subcontract the entire order, basing its bid on a commitment which it had obtained from The Hatheway Manufacturing Company, a small Connecticut manufacturer. Plaintiff had never dealt with Hatheway previously, but secured its name from a trade register which reported Hatheway to have been in business for over 50 years and to have what plaintiff considered to be an adequate credit rating. Hatheway offered to manufacture and deliver the buckles at a unit price of $0.05785. Neither plaintiff nor Hatheway had previously supplied or manufactured such an article and neither was familiar with the costs involved.

Plaintiff had specified clearly in its bid that the entire contract was to be performed by Hatheway under subcontract. Paragraph 27 of the General Provisions, Supply Contract, which accompanied plaintiff's bid and became part of the subsequent contract, provided in part:

> 27. NAMES AND LOCATION OF FACTORIES
>
> The names and locations of the factories where manufacture of the items bid upon will be performed are set forth herein. The performing of any of the work contracted for in any place other than that named herein is prohibited, unless the same is specifically approved in advance by the Contracting Officer.

The time for acceptance of plaintiff's bid was extended to March 20 by mutual consent to afford defendant an opportunity to make a preaward survey of Hatheway's facilities, pursuant to authority in the Armed Service Procurement Regulations. Although the record does not establish

1. Applying the 1% discount to which the Government would have been entitled for payment within 10 days, the total price would have been $74,475.54.

that such a preaward survey was made, the contract was awarded to plaintiff on March 7, 1952, and plaintiff immediately ordered Hatheway to proceed with the subcontract. The contract delivery dates were postponed one month so as to require fixed monthly quantities from May 30 through October 31, 1952. Plaintiff's subcontract with Hatheway did not specify delivery dates, but plaintiff informed Hatheway later in March of the requirements.

Hatheway experienced difficulties in preparing its special jigs and dies, and plaintiff unsuccessfully requested defendant for a change in brass specifications. On July 9, 1952, with no buckles then or thereafter produced, plaintiff learned of Hatheway's insolvency and inability to perform the subcontract. Plaintiff forthwith solicited bids from other manufacturers to complete the contract, obtaining its most favorable offer from Shields Fifth Avenue at a unit price of $0.08. Plaintiff requested defendant without success to be excused from performance, and then asked for an increase in the contract price to $0.08 per unit so that it could subcontract to Shields, without profit to itself. This, too, was refused by the contracting officer.

Meanwhile, on July 18, 1952, the contracting officer terminated plaintiff's contract for default, finding specifically that plaintiff's failure to perform did not arise out of causes beyond its control and without its fault or negligence, and advising plaintiff that the buckles would be procured in the open market and plaintiff would be liable for any excess costs. Plaintiff filed a timely appeal with the Secretary of the Army who, through the Armed Services Board of Contract Appeals, affirmed the contracting officer on August 27, 1953, after a hearing. The contracting officer, after issuing an invitation to numerous suppliers and securing 14 bids, awarded a repurchase contract to Dorset Products, Inc., on October 1, 1952, at unit and total

prices of $.08399 and $98,721.86. Dorset Products, Inc., was the lowest responsible bidder on the repurchase invitation, the lowest bidder having been properly rejected for just cause. Under this contract defendant paid Dorset $98,366.86 for the buckles, representing an excess of $23,893.52 over the price of $74,473.34 in plaintiff's defaulted contract. The contract with Dorset provided for no discount on early payment.

The contracting officer's termination of plaintiff's contract was made pursuant to the following clause 11 of the General Provisions:

> 11. DEFAULT
>
> (a) The Government may, subject to the provisions of paragraph (b) below, by written Notice of Default to the Contractor terminate the whole or any part of this contract in any one of the following circumstances:
>
> (i) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or
>
> (ii) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms; and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.
>
> (b) The Contractor shall not be liable for any excess costs if any failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes include, but are not restricted to acts of God or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, and de-

faults of subcontractors due to any of such causes unless the Contracting Officer shall determine that the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule.

(e) In the event the Government terminates this contract in whole or in part as provided in paragraph (a) of this clause, the Government may procure, upon such terms and in such manner as the Contracting Officer may deem appropriate, supplies or services similar to those so terminated, and the Contractor shall be liable to the Government for any excess costs for such similar supplies or services. *Provided*, That the Contractor shall continue the performance of this contract to the extent not terminated under the provisions of this clause.

* * * * *

12. DISPUTES

Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall be final and conclusive: *Provided*, That if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

The plaintiff contends that the insolvency of its subcontractor made the contract impossible of performance and thus, pursuant to the default clause quoted above, exonerated it from liability. It says that, since the contract by its terms specifically forbade plaintiff from performing any of the manufacturing operations through means other than Hatheway, unless the contracting officer permitted a change, Hatheway's insolvency and consequent inability to perform, which was both beyond plaintiff's control and due to no fault or negligence on its part, destroyed the mutuality and enforceability of the contract because plaintiff had no power thereunder to *require* the Government to accept performance by another subcontractor of plaintiff's choosing. As a defense to the counterclaim this is wide of the mark. It is true that contracts based upon a sole source of supply or upon services of a peculiarly personal nature are often unenforceable against the promisor when they become impossible to perform because of elimination of the source beyond the promisor's control, but this is not such a case. Hatheway was not an exclusive source of supply of brass buckles, or so regarded by defendant. Many other manufacturers were able and willing to produce the item at a price. It can be inferred from the record as a whole that defendant would willingly have permitted plaintiff to perform through another subcontractor at, of course, no additional cost to defendant, but that plaintiff was unwilling to perform the contract at a loss. It would be unrealistic to suppose that the provision placing it within defendant's conceded power to refuse plaintiff permission to substitute subcontractors would make the contract unenforceable against plaintiff until it was shown that plaintiff sought and was denied permission, which was not done. Since buckles were available to plaintiff at greater than its contract price, it was bound to perform and the increased expense alone did not render performance impossible. *Williston on Contracts, 1938 ed., sec. 1963.*

The default provision of the contract excuses the contractor from performance for the default of its subcontractor only if the subcontractor's failure to perform is attributable to certain enumerated causes which are beyond its control and without its fault or negligence. Insolvency of the subcontractor is not included in the enumeration of excuses nor can it be equated to those appearing, for Hatheway's insolvency was not shown to be without its fault or negligence or beyond its control. Plaintiff further offers a completely erroneous interpretation of the default clause to the effect that it is entitled to be excused from performance because the contracting officer made no determination that the supplies defaulted by Hatheway were obtainable from other sources in sufficient time to permit the contractor to meet the required delivery schedule. The provision is to the contrary, and without ambiguity says that, even if the contractor qualifies under one of the enumerated excuses for nonperformance, it is still liable if the contracting officer finds that the supplies defaulted by the subcontractor could have been obtained elsewhere by the contractor in time to meet the delivery schedule.

Plaintiff next maintains that the contracting officer's finding of fault or negligence is not one of fact which, under the disputes clause, he is permitted to make, but that it is rather one of contract interpretation and thus a matter of law beyond administrative competence. The contracting officer's finding that plaintiff's failure to perform was not beyond its control or without its fault or negligence, which was affirmed by the Armed Services Board of Contract Appeals, was a finding of fact which, under Public Law 356 of the 83d Congress (68 Stat. 81), was final and conclusive on the parties absent a showing that the decision was arbitrary, capricious, fraudulent or not based on substantial evidence. *Volentine and Littleton* v. *United States*, 136 C. Cls. 638. Plaintiff has made no such showing here.

But the contracting officer did not make findings on the facts relating to the repurchase contract, for at the time the findings were made the repurchase had not occurred. The Board, however, found that the award of the repurchase contract to the second lowest bidder was proper. To the extent that the Board went beyond the facts found by the contracting officer, this court is not bound to accept its verdict as final. The question is now academic since, proceeding on the facts as presented here, the rejection of the low bid on the repurchase invitation was clearly justifiable. This lowest bid which had been submitted by the Emco Manufacturing Company of Brooklyn, New York, was rejected because a preaward survey had disclosed that company to be "unreliable and incompetent" with a past record of poor management and past failure to meet Government specifications and delivery requirements.

The commissioner of this court, C. Murray Bernhardt, to whom this case was referred and who conducted the trial, filed with his findings on the facts an opinion on the law. Much of what has preceded here has been drawn from that opinion. The commissioner, while holding against plaintiff and for defendant on the principal issues involved, reached the conclusion that defendant, despite the obvious merits of its counterclaim, could not prevail because it had failed to prove performance and payment of the repurchase contract. The evidence which the Government had chosen to stand on with respect to this all important issue was merely the proof that it had awarded a repurchase contract to Dorset in the amount of $98,721.85, plus a certified copy of a Certificate of Indebtedness from the General Accounting Office, stating, *inter alia*, that the total cost to the Government of the repurchase contract with Dorset was in the stated amount. The commissioner was correct in recommending that, as a matter of law, the Certificate of Indebtedness did not constitute proof that the repurchase

contract had either been performed or paid for. *Mohawk Condensed Milk Company* v. *United States*, 70 C. Cls. 671; *Lomax Transportation Co.* v. *United States*, 183 F. (2d) 331, 333. The contract with plaintiff provided that where the Government terminates the contract and enters into a repurchase contract "the Contractor shall be liable to the Government for any excess costs for such similar supplies or services." The evidence of any such excess costs is not of course the amount set forth on the face of the repurchase contract, nor in the Certificate of Indebtedness from the General Accounting Office.

Subsequent to the filing of the commissioner's opinion and findings, and therefore long after the closing of evidence, the defendant secured from the General Accounting Office and furnished as an offer of proof at the argument of this case before the court, certified copies of the vouchers and cancelled checks covering payment to Dorset under the repurchase contract. In its brief defendant moved for leave to reopen the proof to the extent of having these documents admitted in evidence. Such leave is hereby granted,[2] and with that deficiency in defendant's proof supplied, it is found that the amount paid Dorset on the repurchase contract is $98,366.86 rather than $98,721.88 as stated in the contract itself. The excess cost, therefore, which defendant is entitled to recover from plaintiff is $23,893.92, representing the difference between the $74,473.34 which defendant would have paid plaintiff under its contract and the $98,366.86 paid Dorset. Against this sum plaintiff is entitled to offset those amounts which are admittedly due it by defendant on other contracts but the payment of which has been withheld.

---

2. The practice of waiting until this stage to seek the admission of evidence is not favored. It is permitted here not on the ground that this particular evidence is "newly discovered", for such is clearly not the case, but because failure to consider it at this time would deny relief to defendant on what is otherwise a meritorious counterclaim.

No proof was offered by plaintiff in support of the allegation in its petition that under the contracts sued on defendant was indebted to it in the amount of $23,602.30 (later acknowledged by plaintiff to be $23,601.30). The only basis in the record upon which to make a determination as to the amount plaintiff is entitled to receive under the contracts is the admission in defendant's answer and counterclaim that it was withholding the sum of $23,092.57 due plaintiff on those contracts as well as additional amounts due plaintiff on other contracts making a total of $23,237.57 as the amount alleged by defendant to be withheld. The later introduction of the Certificate of Indebtedness issued by the General Accounting Office against plaintiff shows the actual amount being withheld to be $23,244.56. Plaintiff is entitled to a credit in this amount against the amount due on defendant's counterclaim. Plaintiff's petition will be dismissed and judgment will be entered for defendant on its counterclaim against plaintiff in the sum of $648.96.

It is so ordered.

MADDEN, *Judge*; and JONES, *Chief Judge*, concur.

LARAMORE, *Judge*, and WHITAKER, *Judge*, took no part in the consideration and decision of this case.

FINDINGS OF FACT

The court, having considered the evidence, the briefs and argument of counsel, and the report of Commissioner C. Murray Bernhardt, makes the following findings of fact:

1. Plaintiff, Whitlock Corporation, was in December 1951, and continues to be, a New York corporation engaged in business as a wholesale hardware jobber.

2. At various times from February 3, 1953, through October 6, 1953, plaintiff sold and delivered goods to defend-

ant under contracts with the Army and Navy. Defendant, although conceding the services, has withheld payment of $23,244.56, which, together with the sum of $1,003.95, defendant asserts in its counterclaim is due it from plaintiff as excess costs arising from defendant's repurchase of merchandise called for under an earlier contract with plaintiff, which was terminated for default under circumstances hereinafter related.

3. Plaintiff received from the Philadelphia Quartermaster Depot an invitation to bid, dated December 10, 1951, on 1,175,400 brass buckles. Prior to submitting its bid thereon plaintiff solicited bids from four or five manufacturers, receiving its sole response from the Hatheway Manufacturing Company of Bridgeport, Connecticut, whose name plaintiff had selected from a trade register. Hatheway offered to manufacture and deliver, as plaintiff's subcontractor, the entire quantity of buckles called for in defendant's invitation to bid at a price to plaintiff of $57.85 per thousand, or $0.05785 per buckle. Neither plaintiff nor Hatheway had previously supplied or manufactured such an article and neither of them was familiar with the production costs involved. Plaintiff had ascertained to its satisfaction that Hatheway was a reliable manufacturer with over 50 years experience and with what plaintiff considered to be an adequate credit rating, reported in the trade register. Plaintiff had had no previous experience in dealing with Hatheway. In order to perform the subcontract, Hatheway would be required to fabricate special jigs and dies. Defendant did not participate in plaintiff's initial selection of Hatheway as subcontractor.

4. Pursuant to defendant's invitation plaintiff submitted a responsive bid, dated January 9, 1952. The bid specified that acceptance was required in 20 days and that plaintiff had subcontracted the entire quantity to Hathe-

way. After bid submission plaintiff inspected Hatheway's plant.

5. Plaintiff was low bidder at bid opening on January 10, 1952. At defendant's request, plaintiff, on successive occasions, extended the time for acceptance of its bid to March 20, 1952, to give defendant an opportunity to make a preaward survey of Hatheway's facilities as it was authorized to do under the Armed Services Procurement Regulations. The record fails to establish that such a preaward survey was made, but discloses an inspection of Hatheway's facilities by defendant as early as April 25, 1952, considerably after the contract award.

6. a. In the meantime, on March 7, 1952, defendant, through its Philadelphia Quartermaster Depot, awarded plaintiff contract DA 36—030—QM—3362, for the manufacture and delivery of the buckles in question at the unit and total prices of $0.064 and $75,225.60, respectively. Payment within 10 days by the Government would have entitled it to a discount of 1%, or a total price of $74,473.34. The contract required delivery of 210,600 buckles each by the 30th day of April, May, June, and July 1952, 210,600 by August 29, and the remaining 122,400 by September 30, 1952. The Schedule, which accompanied the invitation and which was incorporated into the contract by reference, provided:

> NOTE.—The foregoing delivery requirements are predicated on the assumption that the Government will forward notice of award at least eighty-five (85) calendar days prior to the first scheduled delivery date. The Government will extend each delivery period in the delivery schedule set forth herein by the number of calendar days that this assumption is not realized and the contract will be drawn accordingly.

b. Paragraph 27 of the General Provisions, Supply Contract, which were attached to the invitation and bid and were incorporated into the contract by reference, provided in part:

27. NAMES AND LOCATION OF FACTORIES

The names and locations of the factories where manufacture of the items bid upon will be performed are set forth herein. The performing of any of the work contracted for in any place other than that named herein is prohibited, unless the same is specifically approved in advance by the Contracting Officer. * * *.

c. Standard Form 32, General Provisions (Supply Contract), which was also incorporated into the contract by reference, provided in part as follows:

11. DEFAULT

(a) The Government may, subject to the provisions of paragraph (b) below, by written Notice of Default to the Contractor terminate the whole or any part of this contract in any one of the following circumstances:

(i) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

(ii) If the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

(b) The Contractor shall not be liable for any excess costs if any failure to perform the contract arises of causes beyond the control and without the fault or negligence of the Contractor. Such causes

include, but are not restricted to, acts of God or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, and defaults of subcontractors due to any of such causes unless the Contracting Officer shall determine that the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule.

(c) In the event the Government terminates this contract in whole or in part as provided in paragraph (a) of this clause, the Government may procure, upon such terms and in such manner as the Contracting Officer may deem appropriate, supplies or services similar to those so terminated and the Contractor shall be liable to the Government for any excess costs for such similar supplies or services, *Provided*, That the Contractor shall continue the performance of this contract to the extent not terminated under the provisions of this clause.

* * * * *

12. DISPUTES

Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall be final and conclusive: *Provided*, That if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal.

> Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

7. On or about March 10, 1952, plaintiff ordered Hatheway to proceed with its subcontract and, under date of March 13, 1952, Hatheway formally acknowledged the order for the required quantity of buckles at the stated subcontract price, to be shipped to the Richmond Quartermaster Depot, Richmond, Virginia. Hatheway's confirmation of plaintiff's order omitted reference to delivery dates, but plaintiff informed Hatheway of desired delivery dates by letter of March 25, 1952. Defendant knew that the contract let to plaintiff was to be fully performed by Hatheway as plaintiff's subcontractor, and that the buckles were to be manufactured at and shipped from Hatheway's plant.

8. Delays developed in the performance of Hatheway's subcontract, particularly in the preparation of necessary jigs and dies. Permission was requested by plaintiff, without success, to substitute certain materials. Both plaintiff and defendant were aware that the original delivery schedule was not going to be met. The delivery schedule was revised to make the first deliveries due by May 30, 1952. On July 7, 1952, Hatheway informed plaintiff that it would endeavor to commence deliveries by August 1.

9. No deliveries were made under the contract at any time. On July 9, 1952, plaintiff learned that Hatheway was insolvent and that the buckle subcontract would not be fulfilled. Thereupon, plaintiff solicited bids from other companies to perform the subcontract. The lowest bid received by plaintiff as a result of its inquiries was one from Shields Fifth Avenue, dated July 24, 1952, which offered to supply the required quantity and type of buckles,

f. o. b., Attleboro, Massachusetts, at $0.80 per buckle, with deliveries commencing September 15 and extending to December 1, 1952. The Shields bid was conditioned upon its acceptance by July 26, subsequently extended to July 29.

10. In the meantime, under date of July 18, 1952, the contracting officer sent plaintiff a Notice of Termination for Default, reading in part as follows:

> Due to your failure to make delivery within the time specified and in accordance with the Default article of the contract, you are hereby informed that your right to proceed further with performance under the contract is hereby terminated in its entirety.
>
> Specific description of the acts or omissions constituting the default is given below:
>
> Determination and Findings
>
> I hereby find upon investigating the records
>
> a. That no deliveries have been made to date.
>
> b. That on 20 May 1952 a representative of the Contracting Officer in telephone conversation was informed by a representative of the contractor that its subcontractor was in the process of tooling up, and that he would ascertain when the first shipment would be made and notify this Depot.
>
> c. That on 25 June Mr. Krause, a representative of the contractor informed this Depot that the dies had just been received by the subcontractor, and the shipment of the contractual item would be forthcoming in about ten days.
>
> d. That in letter dated 30 June, contractor requested a deviation from specifications in the manufacture of the contractual item.
>
> e. That on 7 July 1952 at a conference held at this Depot, contractor was notified that his request for deviation, being for his convenience and contrary to contractual terms, could not be authorized.

f. That at this conference contractor was further notified of the urgent need for these Buckles by the Government, and necessity for prompt delivery in accordance with the contractual terms by the contractor.

g. That on 10 July 1952 contractor in an interview with the undersigned stated that he had just learned of the inability of his subcontractor to manufacture the contractual item due to the fact that the subcontractor was in financial difficulties and could not continue performance.

h. That at that conference on the aforesaid date the Contracting Officer notified contractor that it would be necessary for him to furnish proof of his ability to supply the contractual item in accordance with the contractual terms, not later than noon 16 July 1952.

i. That at a conference held at this Depot on 15 July contractor sought to be excused from performance of the contract due to the failure of its subcontractor to supply the item.

j. That at that conference contractor upon being informed that the undersigned had no authority to grant contractor's request, requested additional time to seek a subcontractor to make the item.

k. That Mr. Stein, Vice-President of Whitlock Corporation, telephoned the undersigned on 16 July stating that he had made no definite arrangements to meet the contractual obligations, as of that date he was in the process of contacting additional manufacturers and he hoped to have a subcontractor who could produce the contractual item at a later date.

l. That contractor's failure to perform the subject contract did not arise out of causes beyond its control and without its fault or negligence.

m. That the supplies required under the subject contract will be procured in the open market against

your account and that you will be held liable for any excess costs.

n. That the Government reserves all rights and remedies provided by law or under the contract, in addition to charging excess costs.

This notice constitutes a findings of fact pursuant to the Disputes article of the contract, from which you have the right to appeal as specified therein.

11. Under date of July 21, 1952, the contracting officer issued an invitation to bid to a number of suppliers covering the terminated quantity of buckles under plaintiff's defaulted contract, receiving bids thereon from 14 companies, including the successful bidder, Dorset Products, Inc., which, on July 28, 1952, offered to supply the terminated quantity of buckles at unit and total prices of $0.08399 and $98,721.86, respectively, with delivery of 350,000 each by the 15th day of the succeeding months of November, December, and January, and the balance of 125,400 by January 30, 1953. Dorset was the second lowest bidder. A contract was awarded to Dorset on October 1, 1952, in accordance with its bid. In furnishing the buckles under this contract, Dorset received the sum of $98,366.86.

12. Defendant had also received a bid on the invitation for the terminated quantity from the Emco Manufacturing Company of Brooklyn, New York, at $0.075 per buckle, but rejected it because of a preaward survey disclosing that Emco was "unreliable and incompetent," with a past record of poor management, past failure to meet Government specifications and delivery requirements, and an irresponsible attitude toward delinquencies on Government contracts. Although Emco was low bidder, defendant's rejection of its bid was justifiable.

13. Meanwhile, plaintiff had been negotiating with the contracting officer in the latter part of July 1952, both to

be excused from performance of the contract, which was refused, and to secure an increase in the contract price to $0.08 per unit so that the contract could be completed through Shields Fifth Avenue as subcontractor (finding 9). Under date of July 28, 1952, plaintiff wrote to defendant as follows:

> This will confirm the fact that on July 28, 1958 at at your office our representatives offered to secure for you the Web belt buckles called for in the above contract at a price of 8¢ per unit, on the basis of a firm offer which they had from a proposed subcontractor, Shields, Inc., which was displayed to you. By accepting this arrangement, we would be enabled to start delivery at the rate of 150,000 pieces per week at or about September 15, which is considerably an advance of the delivery schedule set up in the new invitation to bid on this item. Delivery is possible at this early date only because Shields already has the necessary dies for this item.
>
> Shields offer to use expires at noon, July 29.
>
> It was your position that such an arrangement could not be made at the present time.
>
> We must point out to you that the delivery schedule set up in the new invitation to bid on this item makes it impossible for anyone to bid and complete delivery within the period specified unless he has already tooled up and has the dies prepared for this item. Other experienced manufacturers are refusing to bid on the item because of the short delivery schedule. This will tend to keep the bidding within a small, select group.
>
> We hope that some means can be found to immediately reenstate our contract at the price of 8¢, so that we can go forward with this order. You will note that we are undertaking thereby to waive any profit margin for ourselves.

Plaintiff's offer was declined by defendant. There is no evidence that plaintiff at any time offered to adhere to its

original contract price if defendant would permit the substitution of Shields as subcontractor in place of Hatheway.

14. On August 14, 1952, plaintiff appealed the decision of the contracting officer to the Secretary of the Army. Hearing thereon was held on July 7, 1953. On August 27, 1953, the Armed Services Board of Contract Appeals denied the appeal, ruling that the termination was proper, sustaining the finding of the contracting officer that plaintiff's failure to deliver was not beyond its control and without its fault or negligence, and holding that plaintiff's excuse for failure to perform was inadequate. The Board also found that the award of the repurchase contract to the second lowest bidder was proper. Thereupon, plaintiff filed its petition in this court on January 27, 1954.

15. Under the contracts set forth in the petition, plaintiff is found to be due the sum of $23,092.57. Defendant has withheld this sum, as well as amounts due plaintiff on other contracts in the amount of $151.99, making a total of $23,244.56 withheld. The difference between what defendant would have paid for the buckles under plaintiff's contract and what it paid Dorset under the repurchase contract is found to be $23,893.52, leaving a net amount of $648.96 due defendant on its counterclaim.

Conclusion of Law

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover and its petition is dismissed. The court further concludes that defendant is entitled to recover on its counterclaim and it is therefore adjudged and ordered that defendant recover of and from the plaintiff on its counterclaim the sum of six hundred forty-eight dollars and ninety-six cents ($648.96).